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NO. 81-2149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERMAN SOLEM, Warden
South Dakota State Penitentiary,

Petitioner,

v.

NORMAN STUMES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENTS AND AUTHORITIES

I

RESPONDENT'S CONSTITUTIONAL RIGHTS UNDER MIRANDA AND EDWARDS WERE NOT VIOLATED BY THE INTERROGATION WHICH OCCURRED IN THIS CASE.

Although a "totality of circumstances" approach was applied by the court of appeals to the questioning of the Respondent, Norman

Stumes, that court divided his interrogation into four sections. Viewed individually or together it is clear that the interrogation conducted in this case did not violate Stumes' constitutional rights under Miranda or its progeny, including Edwards v. Arizona, 451 U.S. 477 (1981) and Oregon v. Bradshaw, 103 S.Ct. 2830 (1983).

After Stumes had fled South Dakota and been apprehended in Green Bay, Wisconsin, he was questioned by Sioux Falls, South Dakota Police Department detectives who had traveled to Green Bay to transport Stumes back to Sioux Falls. The first session occurred on the morning of October 1, 1973. Stumes was given his Miranda rights, agreed to talk with police, and made no statements implicating himself in the Hoff killing. In response to Detective Green's question regarding whether Stumes would be willing to take a polygraph examination, Stumes indicated that he felt

that he should talk with his Sioux Falls attorney before deciding whether to take the polygraph test. Trial Transcript 461. Questioning ceased at that time.

Later in the afternoon of October 1, 1973, approximately five hours after the conclusion of morning interrogation, Detectives Skadsen and Green returned to the Brown County, Wisconsin, Sheriff's Department to question Stumes. No Miranda warnings were given to the Respondent at that time. In response to a question from Detective Green, Stumes indicated that Joyce Hoff's death was accidental. Trial Transcript 35.

The following morning, October 2, 1973, shortly after Stumes, Detectives Skadsen and Green, and a Minnehaha County, South Dakota, Deputy Sheriff had begun the return trip to Sioux Falls by automobile, Stumes was once again given his Miranda rights. He indicated

that he understood them and agreed to talk about the Hoff homicide. Later that afternoon, when the group was about 90 miles from Sioux Falls, Stumes broke down and stated that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. After Detective Green had advised Stumes that he would "feel better if he got it off his chest," (Trial Transcript 42), Stumes related how he strangled Joyce Hoff. Id. Stumes also told the officers that he would provide a full statement when they arrived in Sioux Falls. Trial Transcript 44.

After arrival in Sioux Falls at approximately 6:45 p.m. on the evening of October 2, 1973, Stumes was placed in the Minnehaha County jail. Shortly thereafter, Stumes asked to see Detective Skadsen. Skadsen came to Stumes' cell and, according to Skadsen:

> "He [Stumes] was crying again, and he put his head on my shoulder, and he said 'please tell them that I didn't mean to kill her, that it was an accident--that I am not a vicious killer.'

Trial Transcript 547.

Miranda v. Arizona, 384 U.S. 436 (1966), provided standards for police conducting custodial interrogations of criminal suspects. While Miranda instructed the police that interrogation must cease when a suspect requests an attorney, and not resume until a lawyer is present, that decision did not prohibit all questioning subsequent to the request of an attorney. The prosecution must meet its "heavy burden" of demonstrating that an accused voluntarily, knowingly, and intelligently waived his right to counsel in order to introduce a confession made in the absence of counsel. Statements volunteered by a suspect are admissible. Miranda, 384 U.S. 478. Whether a suspect waived his

rights must be examined in light of the totality of the circumstances, which includes the accused's background, experience and age. Fare v. Michael C., 442 U.S. 707, 725 (1979). The State met its burden under the Miranda standard, as well as under the new constitutional doctrine of Edwards and Bradshaw.

Stumes was given his Miranda warnings when he was arrested by Wisconsin authorities. Prior to the first questioning session he was again given his rights and he agreed to talk. Stumes indicated his understanding of his constitutional rights by stating that he wanted to speak with his Sioux Falls attorney before deciding whether to take a polygraph examination. When Detectives Skadsen and Green returned to question Stumes on the afternoon of October 1, he indicated, after responding to some of their questioning, that he wanted to consult with an attorney. On both occasions Stumes' right

to terminate questioning was "scrupulously honored." See Mosley v. Michigan, 423 U.S. 96, 102 (1975).

During the questioning session of the afternoon of October 1, 1973, Stumes indicated that Joyce Hoff's death had been accidental. Trial Transcript 35. Stumes, in his brief, attempts to exaggerate the importance of his statement. While the "accidental" comment was Stumes' first indication that he was involved in the Hoff killing, that statement did not compel him to confess the following day on the trip to Sioux Falls. Stumes advances a "fruit of the poisonous tree" argument, see Wong Sun v. United States, 371 U.S. 471 (1963), claiming that but for the interrogation which produced the "accidental" statement of October 1, he would not have confessed the following day. That argument has little merit.

Stumes' claim that Hoff's death was accidental indicated not only his knowledge of the manner in which she died, but also served as a denial of criminal responsibility for her death. The confession given by Stumes during the automobile trip, in which he stated that he strangled Hoff, stands as a repudiation of his earlier statement that her death was accidental and was an admission of his guilt. Viewed in this light, Stumes' "accidental" statement of October 1 cannot be seen as the cause of his confession on the following day. His statement of October 2 was a full confession, not an attempt to explain how Hoff's death might have accidentally occurred. It simply does not follow that a confession admitting guilt must result from a statement denying criminal responsibility. As the District Court found, Stumes' "accidental" admission was harmless.

The confession that Stumes made during the automobile trip and his later statement at the Minnehaha County jail that he wasn't a "vicious killer," were not obtained in violation of his constitutional rights. A brief review of the circumstances demonstrates the voluntary nature of both statements.

Stumes was given his Miranda warnings shortly after the return trip to Sioux Falls had begun. He indicated his willingness to talk about the Hoff homicide. The trip was uneventful until about 90 miles outside of Sioux Falls when Stumes suffered his "little conflict with [his] emotions" and remarked that he "couldn't understand why anybody would want to kill Joyce, and that the taking of a human life is so useless." Trial Transcript 625. Detective Green, as mentioned above, then advised Stumes that he would "feel better after he got this off his chest."

Trial Transcript 42. Stumes then told the officers how Joyce Hoff died. Id. When Green admonished Stumes that his attorney wouldn't want him to make a statement, as Stumes promised to do upon arrival in Sioux Falls, Stumes indicated his unwillingness to follow his attorney's advice, stating that "he didn't give a damn what his attorney said; he could talk to anybody he wanted to." Trial Transcript 44.

It is significant that Stumes was not being interrogated when he confessed. In fact, according to his own testimony, there had been no conversation of any kind in the car for 10 to 15 minutes before he began to talk. Trial Transcript 626. In fact, Stumes testified at trial that there had been no direct interrogation during the trip and that, during the afternoon of the trip, there was "general conversation." Trial Transcript 624, 625. The situation was so relaxed that,

according to Stumes, Detective Skadsen was "just about asleep in the front seat." Trial Transcript 626. This was hardly a situation in which relentless interrogators engaged in third degree tactics to coerce a confession from a terrified suspect.

Applying the test of Oregon v. Bradshaw, it is clear that Stumes' admissions were not secured in violation of the Constitution. First, Stumes had been given his Miranda rights shortly after the trip began. He indicated that he understood his rights and was willing to talk. When Stumes finally had his "little conflict with his emotions" and confessed, he clearly initiated a further conversation with police within the strictures of Bradshaw. It bears repeating that there had been no conversation in the car for at least 10 minutes before Stumes spoke. And his statements clearly indicated his desire for a generalized discussion of the crime and

its investigation. The second part of the Bradshaw test, determining whether Stumes waived his Fifth Amendment rights was also satisfied. An examination of the particular facts and circumstances surrounding his admissions indicates that Stumes voluntarily waived his rights. As the District Court pointed out, Stumes was not a novice in dealing with the court system and law enforcement, as he had been previously involved in both civil and criminal matters. He had been given his Miranda rights not only on the morning of his confession, but also the day before and when he was arrested in Green Bay. Stumes had indicated his understanding of those rights by terminating the Detectives' questioning at both the morning and afternoon sessions on October 1. He was not coerced in any manner to confess and spoke voluntarily, even stating, according to Detective Green, that "he [Stumes] wanted to tell somebody

about it but he just didn't know how to go about it." Trial Transcript 478. In addition, after having said that he would give a statement when they arrived in Sioux Falls, and being told by Detective Green that his attorney would advise Stumes against giving such a statement, Stumes indicated his unwillingness to follow his attorney's instructions. Stumes' waiver of his constitutional rights to remain silent and to counsel was knowing, intelligent and voluntary.

After Stumes had been placed in his cell at the Minnehaha County jail in Sioux Falls, he asked to see Detective Skadsen. When Skadsen came to his cell, Stumes was crying and told Skadsen that he "didn't mean to kill her" and that he was not a vicious killer. Trial Transcript 547.

Applying the Edwards-Bradshaw criteria, it is clear that Stumes initiated the above

jailhouse exchange and that his admission was directed towards a generalized discussion of the crime and its investigation. Once again, as he did when he confessed during the trip, Stumes effectively waived his constitutional rights. He was not under interrogation while in the jail and Detective Skadsen came to his cell at Stumes' request. Stumes knowingly, intelligently and voluntarily surrendered his rights when he spoke with Detective Skadsen.

In sum, Stumes simply countermanded his decision not to talk with the police when he confessed on October 2. Under the line of cases beginning with Miranda, he was free to change his mind and talk with law enforcement officers.

Finally, it is instructive that the Sioux Falls attorney who was initially retained by Stumes' mother to represent her son felt that the police had not engaged in unlawful conduct:

> "I didn't have any agreement with the police department with respect to questioning him. I only had an agreement--the only agreement I had was with respect that they contact me if they found him before I did. They kept their part of the obligation, as far as I was concerned, in that respect." [Testimony of Steve Jorgenson, District Court Evidentiary Hearing, October 6, 1977, at 25.]

II

RETROACTIVE APPLICATION OF A NEW STANDARD OF CRIMINAL PROCEDURE IS NOT REQUIRED BY THE UNITED STATES CONSTITUTION.

As Petitioner stated in his initial brief, this Court's decision in Edwards v. Arizona represents more than simply an amplification of Miranda. The "totality of circumstances" approach has been utilized since Johnson v. Zerbst, 304 U.S. 458 (1938), to determine whether an accused has waived a constitutional right. However, in Edwards, this Court grafted a new requirement onto the Miranda teachings, the necessity that the suspect "initiate" further conversation with

the police once he has invoked his constitutional rights. The focus on initiation of police-suspect contacts is not the result of a predictable evolution of Miranda. As this Court has held on many occasions that Miranda is not retroactive, see, e.g., Johnson v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737 (1966), so should you hold as regards Edwards. The Edwards decision has effected substantial change in the standards guiding custodial interrogation. Police must be weary of the slightest indication by a suspect that he desires to terminate questioning. A casual inquiry as to whether a suspect desired to resume speaking with police after he had invoked his right to silence and requested counsel could be construed as an "initiation" of conversation by the police, and subsequent admissions subject to suppression under a strict reading of Edwards. Such emphasis on

who initiated an exchange between a suspect and his interrogators had not been the primary focus of the Miranda line of cases prior to Edwards. The Edwards-Bradshaw test has elevated the issue of who initiated a conversation to a central position in the determination of waiver of Fifth Amendment rights. This militates against retroactive application of Edwards as law enforcement officers had been relying upon pre-Edwards standards.

Retroactive application of a new constitutional standard is determined by application of three criteria: the rule's purpose, the extent of reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. Brown v. Louisana, 447 U.S. 323, 328 (1980). The purpose of the new rule

is the most important of the above criteria. Id. A rule which corrects any aspect of a criminal trial which impairs its truth-finding function and raises questions about the accuracy of guilty verdicts is to be given retroactive effect. Id.

As Petitioner demonstrated in his initial brief, application of the Brown criteria militates against retroactive application of Edwards. The extent of police reliance on pre-Edwards standards has been discussed above and will not be repeated here. The other concerns which are determinative of Edwards' retroactive application will be discussed briefly.

The paramount concern, of course, is the purpose of the new constitutional rule. The purpose of those cases, beginning with Miranda, that deal with custodial interrogation is to insure that the suspect is able to

effectively exercise his constitutional rights to remain silent and to counsel. The setting of limits on police conduct in a custodial interrogation setting enables a suspect to exercise his rights. These concerns, however, do not directly implicate a trial's truth-finding function nor do they affect reliability of guilty verdicts.

A guilty person's confession, obtained by police conduct in violation of the accused's Fifth Amendment rights, would be excluded from use at his trial. Although the confession is accurate, the determination of truth and the reliability of verdicts are subordinated under the Fifth Amendment to the considerations noted above: insuring an opportunity for the effective exercise of his constitutional rights by an in-custody suspect subject to questioning and curbing overzealous police interrogation. Applying Edwards retroactively will not improve the

truth-finding process at trial nor the reliability of verdicts. Edwards, as the other Fifth Amendment cases preceding it, is concerned with pretrial custodial interrogation. There is simply no need for retroactive imposition of the Fifth Amendment's exclusionary rule. To do so in this case would require the exclusion of Stumes' accurate and trustworthy admissions.

The retroactive application of Edwards would have a devastating effect on the administration of justice. Imposing the Edwards standards retroactively could require the retrial of many convicted felons whose convictions became final long ago. The result may be that many criminals, justly convicted, will be retried, but prosecutors will be prohibited from using otherwise trustworthy confessions. If other evidence is insufficient, or, because of the passage of time,

unavailable, then guilty individuals may walk free. This case illustrates that point well.

Stumes killed Joyce Hoff ten years ago. He testified at trial that he went to her apartment in the late night hours of September 16, 1973, had sexual intercourse with her, and remained in her apartment until the following morning. Trial Transcript 604-614. Hair found on the victim's body was identified as matching hairs taken from Stumes. Trial Transcript 354-356. If Stumes must be retried without benefit of his admissions and trial testimony, it being rather unlikely that he would chose to testify at his retrial, the final result may well be the acquittal of a killer. Discovering an evidentiary substitute for Stumes' confessions will be a difficult, probably impossible task.

As noted above, this crime occurred ten years ago. Retrying Stumes now will require

trying to relocate witnesses who may have moved away or perhaps even died. Even those who can be located will have to try to remember the events of a decade ago.

III

RESPONDENT DID NOT SUFFER ANY DEPRIVATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS THAT RIGHT DID NOT ATTACH PRIOR TO THE INCRIMINATING STATEMENTS MADE BY RESPONDENT.

While the District Court found that Stumes has suffered no violation of his Sixth Amendment right to counsel and the Eighth Circuit Court of Appeals chose not to deal with the issue, Respondent has implicitly raised the Sixth Amendment claim in this Court by setting forth the language of the Sixth Amendment in his brief and comparing the automobile trip in this case to that taken by the respondent in Brewer v. Williams, 430 U.S. 387 (1977). Accordingly, Petitioner will briefly address Stumes' Sixth Amendment claim.

The Sixth Amendment right to counsel attaches only "after the initiation of adversary judicial criminal proceedings--whether by way of formal charges, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Stewart, J., plurality opinion); Brewer v. Williams, 430 U.S. 387, 398 (1977). The Sixth Amendment prohibits the police from "eliciting incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed." Rhode Island v. Innis, 446 U.S. 291, 300, n. 4 (1980).

Analyzed in light of the above cases, it is clear that Stumes' Sixth Amendment claim has no merit. Stumes' arrest and confinement in Green Bay were a result of other criminal charges pending against him and his status as a suspect in the Hoff homicide. However, no

"adversary judicial proceedings" had been commenced against him in connection with the killing. Stumes was not formally charged with murder until after his return to Sioux Falls. His Sixth Amendment right to counsel, therefore, was not violated by the questioning which took place on October 1 and October 2, 1973. Stumes also contends, apparently, that his Sixth Amendment rights were violated by the conversations which took place among the detectives and himself during the trip back to Sioux Falls on October 2, 1973. He compares that trip with the one taken by the respondent in Brewer v. Williams. There are two obvious differences between the situation in Brewer and that in this case. First, the police in Brewer tried to psychologically coerce Williams, an escaped mental patient who was deeply religious, by reciting a "Christian burial speech" designed to induce

Williams to say where he had hidden the body of the ten-year old girl whom he had abducted. The conduct of detectives Skadsen and Green in this case does not approach the transgressions of the officers in Brewer. Secondly, and most importantly from the viewpoint of the Sixth Amendment's right to counsel, Williams had been arraigned in Davenport, Iowa, on the arrest warrant, charging him with abduction of the girl, before beginning the return trip to Des Moines. "Adversary judicial proceedings" had begun prior to the trip. In this case, no arraignment or other adversary judicial proceeding related to the Hoff homicide had been commenced before Stumes was transported back to Sioux Falls. The District Court was correct in finding that Stumes suffered no Sixth Amendment deprivations as his rights under that constitutional provision had not attached relative to the Hoff killing.

CONCLUSION

This case illustrates how the trial is being relegated to a position of secondary importance in our criminal justice system. The determination of an accused's guilt or innocence should be the focal point of that system. Yet the trial has become only the first skirmish in what appears to be the criminal justice system's version of the Hundred Years War. Stumes was convicted nearly ten years ago, the time for direct appeal and seeking certiorari have long passed. However, by utilizing habeas corpus procedures and the appellate process, Stumes has been able to challenge his "final" conviction for almost a decade. Petitioner does not argue with the availability of federal post-conviction remedies necessary to cure the constitutional defects of state trials and judgments. Petitioner only urges this

Court to consider fully the effects of requiring the retroactive application of Edwards. In this case, at least, retroactive application of Edwards may result in the injustice of a convicted killer regaining his freedom. To serve law at the expense of justice benefits neither our legal system nor society. In fact, it is only society that is punished when otherwise truthful confessions are excluded. The putative unconstitutional conduct of the police is not cured nor is an innocent person set free. The opposite occurs: justice is denied and the guilty regain their freedom.

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in his initial brief, the Petitioner respectfully requests that this Court reverse the decision of the Eighth

Circuit Court of Appeals and find that Respondent is not entitled to habeas corpus relief under 28 U.S.C. § 2254.

Respectfully submitted,

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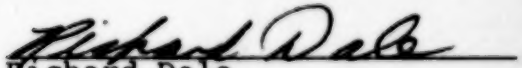

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